No. 05-5992

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In The

Supreme Court of the United States

JACOB ZEDNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

The Speedy Trial Act of 1974, as amended in 1979 and 1984, 18 U.S.C. §§ 3161-3174 (West 2005), requires the Government to bring a criminal defendant who pleads not guilty to trial within 70 days, excluding certain specified periods. 18 U.S.C. § 3161(c)(1) & (h). If this time limit is exceeded, the "indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). Dismissal may be either "with or without prejudice." *Ibid.* The Act specifies only one way in which a defendant may waive this right to dismissal, *i.e.*, by not moving to dismiss before trial. *Ibid.*

This case presents two questions that divide the courts of appeals:

1. Whether, in light of the statute's text and Congress's goal of protecting the public interest in prompt criminal trials, the requirements of the Speedy Trial Act may be waived only in the limited circumstances mentioned in the statute, the issue left open in *New York v. Hill*, 528 U.S. 110, 117 n.2 (2000).

2. Whether a violation of the Speedy Trial Act's 70-day time limit for bringing a defendant to trial is subject to harmless-error analysis, despite the statute's mandatory language stating that, in the event of a violation, the "indictment shall be dismissed."

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND RULES INVOLVED	1
STATEMENT OF THE CASE	1
Introduction	1
The Speedy Trial Act: An overview	3
The speedy trial waiver "for all time"	5
The 1997 delay: January 31, 1997 to May 2, 1997	6
The delay from 1997 to 2000	8
The delay from 2000 to 2001	8
The motion to dismiss the indictment	10
The trial and sentence	10
The decision of the court of appeals	12
SUMMARY OF ARGUMENT	14
ARGUMENT	18
I. A defendant may waive the requirements of the Speedy Trial Act only as the statute specifically permits	18

TABLE OF CONTENTS – Continued

Page

A. Waiver of a statutory right is not permitted where waiver would contravene the statute's text, structure and purpose 18

B. Permitting waiver of the Speedy Trial Act's 70-day time limit is inconsistent with the Act 19

C. The purported waivers relied upon by the courts below were ineffective to toll the Act's 70-day time limit 29

II. A violation of the Speedy Trial Act's 70-day time limit is not subject to harmless-error analysis 33

A. Harmless-error analysis does not apply where a statutory timing provision mandates the sanction of dismissal for a violation 34

B. Harmless-error analysis is inconsistent with the remedial framework of the Act 38

C. The history and purpose of the dismissal provision do not support the application of harmless-error analysis 40

D. The decision of the court of appeals should be vacated 42

CONCLUSION 44

TABLE OF AUTHORITIES

Page

CASES

Alabama v. Bozeman, 533 U.S. 146 (2001) ..... *passim*

Anderson v. Yungkau, 329 U.S. 482 (1947) 36

Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) 25

Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) 19

Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945) 18, 19

Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992) 16

Crosby v. United States, 506 U.S. 255 (1993) 18

Dodd v. United States, 125 S. Ct. 2478 (2005) 30

Escoe v. Zerbst, 295 U.S. 490 (1935) 36

Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990) 30, 31

Henderson v. United States, 476 U.S. 321 (1986) 9

Lamie v. United States Trustee, 540 U.S. 526 (2004) 42

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 37

New York v. Hill, 528 U.S. 110 (2000) 18, 28, 29

Richards v. United States, 369 U.S. 1 (1962) 43

Russello v. United States, 464 U.S. 16 (1983) 25

Smith v. United States, 360 U.S. 1 (1959) 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Berberian, 851 F.2d 236 (9th Cir. 1988) 6

United States v. Blackwell, 12 F.3d 44 (5th Cir. 1994) 14, 31

United States v. Brenna, 878 F.2d 117 (3d Cir. 1989) (per curiam) 35

United States v. Carrasquillo, 667 F.2d 382 (3d Cir. 1981) 6, 26, 27

United States v. Doran, 882 F.2d 1511 (10th Cir. 1989) 35

United States v. Dunbar, 357 F.3d 582 (6th Cir. 2004), *vacated*, 543 U.S. 1099 (2005) 35

United States v. Gambino, 59 F.3d 353 (2d Cir. 1995) 6

United States v. Garrett, 720 F.2d 705 (D.C. Cir. 1983) 35

United States v. Hastings, 847 F.2d 920 (1st Cir. 1988) 35

United States v. Janik, 723 F.2d 537 (7th Cir. 1983) 41

United States v. Johnson, 29 F.3d 940 (5th Cir. 1994) 35

United States v. Jones, 887 F.2d 492 (4th Cir. 1989) 35

United States v. Keith, 42 F.3d 234 (4th Cir. 1994) 6

United States v. Koory, 20 F.3d 844 (8th Cir. 1994) 35

United States v. Kucik, 909 F.2d 206 (7th Cir. 1990) 6, 31

United States v. Lewis, 349 F.3d 1116 (9th Cir. 2003) (per curiam) 35

TABLE OF AUTHORITIES – Continued

Page

United States v. Lloyd, 125 F.3d 1263 (9th Cir. 1997) 26

United States v. Mezzanatto, 513 U.S. 196 (1995) 15, 18, 24, 29

United States v. Montalvo-Murillo, 495 U.S. 711 (1990) 36

United States v. Pringle, 751 F.2d 419 (1st Cir. 1984) 6, 31, 41

United States v. Ramirez-Cortez, 213 F.3d 1149 (9th Cir. 2000) 24

United States v. Ray, 768 F.2d 991 (8th Cir. 1985) 6

United States v. Saltzman, 984 F.2d 1087 (10th Cir. 1993) 6, 26, 28

United States v. Smith, 415 F.3d 682 (7th Cir. 2005), *petition for cert. filed*, [U.S. Oct. 15, 2005] (No. 05-7009) 35

United States v. Stafford, 697 F.2d 1368 (11th Cir. 1983) 35

United States v. Taylor, 487 U.S. 326 (1988) ..... *passim*

United States v. Willis, 958 F.2d 60 (5th Cir. 1992) ..... *passim*

United States v. Zedner, 193 F.3d 562 (2d Cir. 1999) (per curiam) 8

United States v. Zedner, 29 Fed. Appx. 711 (2d Cir. 2002) 10

United States v. Zedner, 401 F.3d 36 (2nd Cir. 2005), *cert. granted*, 126 S. Ct. 978 (2006) 1

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS, STATUTES AND RULES

U.S. Const. amend. VI 10, 26

18 U.S.C. § 3161-3174 1

18 U.S.C. § 3161(b) 4

18 U.S.C. § 3161(c)(1) ..... *passim*

18 U.S.C. § 3161(c)(2) 24, 36

18 U.S.C. § 3161(h) 2, 14, 22

18 U.S.C. § 3161(h)(1)(J) 3, 9

18 U.S.C. § 3161(h)(1)-(7) 3

18 U.S.C. § 3161(h)(8) 23

18 U.S.C. § 3161(h)(8)(A) ..... *passim*

18 U.S.C. § 3161(h)(8)(B)(ii) 10

18 U.S.C. § 3161(h)(8)(B)(iv) 4

18 U.S.C. § 3161(h)(8)(C) 4

18 U.S.C. § 3161(h)(9) 27

18 U.S.C. § 3162(a)(1) 4

18 U.S.C. § 3162(a)(2) ..... *passim*

18 U.S.C. § 3162(b) 32

18 U.S.C. § 3164(a) 3

18 U.S.C. § 3164(b) 3

18 U.S.C. § 3164(c) 22

18 U.S.C. § 3288 41

18 U.S.C. § 5036 22

18 U.S.C. App. 2 § 2 ..... 17, 35

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. App. 2 § 2, Article IV(e) 36

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2111 ..... 1, 17, 37

Fed. R. Crim. P. 52(a) 1, 17, 37

LEGISLATIVE MATERIALS

120 Cong. Rec. 41618 (1974) 21

H.R. 7107, 92d Cong., 1st Sess. (1971) 42

H.R. Rep. No. 93-1508 (1974) 20, 22

Pub. L. No. 93-619, 93rd Cong., 88 Stat. 2076 (Jan. 3, 1975) 20

Pub. L. No. 100-690, § 7081(a), 102 Stat. 4407 41

S. 895, 92d Cong., 1st Sess. (1971) 22, 42

S. Rep. No. 93-1021 (1974) 19, 20, 22, 23

S. Rep. No. 96-212 (1979) 21, 25, 26, 27

Comments on S. 895 in Letter to Sen. Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 255-56 (1971) 23

Prepared Statement of Assistant Attorney General William H. Rehnquist, *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 107 (1971) 43

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974* (Fed. Judicial Center 1980) 20, 21, 23, 43

Committee on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended* (Dec. 1979 rev., with amendments through Oct. 1984), 106 F.R.D. 271 (1984) 24, 28

OPINIONS BELOW

The opinion of the court of appeals is reported at 401 F.3d 36. J.A. 189-220. The opinion of the district court denying petitioner's motion to dismiss the indictment under the Speedy Trial Act is unpublished. J.A. 128-44. The judgment of conviction appears at J.A. 179-88.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2005. The order of the court of appeals denying petitioner's request for rehearing and rehearing *en banc* was entered on May 24, 2005. J.A. 221-22. The petition for certiorari was filed on August 22, 2005, and granted on January 6, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This case involves the Speedy Trial Act of 1974, as amended in 1979 and 1984, 18 U.S.C. §§ 3161-3174 (West 2005) ["Speedy Trial Act" or "the Act"], 28 U.S.C. § 2111 and Fed. R. Crim. P. 52(a). These statutes and Rule 52(a) are reproduced in the Appendix annexed to this brief.

STATEMENT OF THE CASE

Introduction

Jacob Zedner did not receive a speedy trial. A decade ago, on March 12, 1996, the United States Secret Service

arrested him after he presented a phony $10 million "U.S. Dollar Bond" to six financial institutions. J.A. 191. The institutions rejected the document because of obvious indicia that it was not real, such as gross misspellings (*e.g.*, "Onited States," "Thunted States," "Cgicago") and references to the non-existent "Ministry of Finance of U.S.A." J.A. 191 & n.1. Mr. Zedner explained the misspellings as a "secret code" that proved the bond's authenticity, but the banks were not persuaded. J.A. 140, 191; Trial Tr. 121.

Following petitioner's release on bail, a Grand Jury in the Eastern District of New York indicted him for bank fraud on April 4, 1996. J.A. 66-69, 191. Absent excludable delay, the Speedy Trial Act required that his trial commence within 70 days of the indictment, *i.e.*, by June 13, 1996. *See* 18 U.S.C. § 3161(c)(1) & (h). Mr. Zedner was not tried until April 7, 2003 (J.A. 196), more than seven years after his indictment and more than two years after he requested a trial "as soon as possible." J.A. 90, 194.

This case concerns two periods of delay that were not excluded on any basis under the Speedy Trial Act. The first period is a 90-day delay from January 31, 1997 to May 2, 1997. This delay occurred when the district court granted the defense an adjournment but did not find, as required by the Act, that the "ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). The second period of delay concerns 195 days that passed from August 23, 2000 to March 6, 2001. During this time, the district court held a competency proceeding under advisement, despite the command of the Act that only 30 days are excludable for the time a "proceeding concerning the

defendant is actually under advisement by the court." 18 U.S.C. § 3161(h)(1)(J).

The district court found no speedy trial violation. It relied on a purported waiver of speedy trial rights "for all time" that petitioner and his counsel had executed at the court's urging in November 1996. The court of appeals affirmed, but on other grounds. The court did not find that the prospective waiver "for all time" was valid. The court held, however, that the 90-day delay in 1997 had been implicitly waived by counsel, and that the subsequent 195-day delay was harmless error. J.A. 203-04, 206-09.

The Speedy Trial Act: An overview

The Speedy Trial Act mandates, *inter alia*, that a criminal trial "shall commence" within 70 days of the indictment or the defendant's first appearance, whichever occurs later. 18 U.S.C. § 3161(c)(1).[1] The Act automatically excludes various categories of delay from the 70-day limit. 18 U.S.C. § 3161(h)(1)-(7). It also contains an "ends of justice" provision that excludes

> [a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best

[1] A 90-day time limit applies to a person "who is being held in detention solely because he is awaiting trial" or to "a released person who is awaiting trial and has been designated * * * as being of high risk." 18 U.S.C. § 3164(a), (b).

> interest of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h)(8)(A). This provision further states:

> No such period of delay * * * shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

Ibid. In deciding whether to grant an "ends of justice" continuance, the court "shall consider" enumerated statutory factors, such as the complexity of the case and the need for effective trial preparation, "taking into account the exercise of due diligence." 18 U.S.C. § 3161(h)(8)(B)(iv). A continuance may not be granted because of "general congestion of the court's calendar." 18 U.S.C. § 3161(h)(8)(C).

If the 70-day limit is exceeded, the "indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). Dismissal may be "with or without prejudice" to reprosecution depending on the "seriousness of the offense[,]" the "facts and circumstances of the case which led to the dismissal[,]" the prejudice, if any, to the defendant, and the "impact of a reprosecution on the administration of [the Act] and on the administration of justice." *Ibid.*; *United States v. Taylor*, 487 U.S. 326, 342 (1988).[2] The Act provides only one way for a defendant to waive his

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[2] A similar scheme applies to the provisions of the Act that require that an indictment be returned within 30 days of the defendant's arrest. 18 U.S.C. § 3161(b), 3162(a)(1).

right to dismissal: by not moving to dismiss before trial. 18 U.S.C. § 3162(a)(2).

The speedy trial waiver "for all time"

The court granted Zedner adjournments from April through November 1996. Upon each adjournment, the court entered an order of "excludable delay." J.A. 191-92.

On November 8, 1996, defense counsel sought another delay through the end of January 1997. The court said, "if I'm going to give you that long an adjournment, I will have to take a waiver for all time." J.A. 71. The court explained that it had "some big cases" pending and "if I get bogged down with them [it] may be a long while before you get a trial." J.A. 71. The court added, "I have to take what I call a complete waiver where he can't come in * * * and say I only waive for so long as it is convenient for me to waive." J.A. 71. Defense counsel responded, "We've [sic] waive for all time. That will not be a problem. That will not be an issue in this case." J.A. 72.

The court presented Zedner with a form that recited, *inter alia*, "I have been advised of and fully understand my rights to a speedy trial and my rights to make a motion to dismiss in the event I am not accorded a speedy trial and I hereby waive all such rights and so waive them for all time." J.A. 79. The court took the position that such a waiver was enforceable and stated that "nobody has yet challenged [this position] who has read the Speedy Trial Act." J.A. 73. In fact, every court of appeals to have considered the issue, including the Second Circuit, had already held that speedy trial waivers were invalid because they

undermined the public interest in swift justice that the Act protects.[3]

The court also announced that the waiver was irrevocable. It explained, "[O]nce you say, Judge, I'm not going to and I will not make a motion to dismiss the case against me for failure to give me a speedy trial, you cannot get it back. You've waived it and it's gone." J.A. 73.

Petitioner and his counsel executed the waiver on November 8, 1996. The court also entered an order excluding the delay through January 31, 1997. J.A. 192.

The 1997 delay: January 31, 1997 to May 2, 1997

At the January 31 conference, the Government stated it "would like to try the case sometime in 1997." J.A. 81. The prosecutor noted that "the defendant has waived for all time but I would like to try it before then." J.A. 81.

Although the case had been pending for more than nine months, defense counsel wanted more delay, noting that Zedner would waive his speedy trial rights again. J.A. 81. The court responded, "You don't have to do it twice because once you've waived you can't get it back." J.A. 81.

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[3] *See United States v. Gambino*, 59 F.3d 353, 359-60 (2d Cir. 1995) ("We join with every circuit that has addressed the issue in finding that defendants generally may not elect to waive the protections of the Act.") (citing *United States v. Keith*, 42 F.3d 234, 238 (4th Cir. 1994); *United States v. Saltzman*, 984 F.2d 1087, 1091 (10th Cir. 1993); *United States v. Willis*, 958 F.2d 60, 63 (5th Cir. 1992); *United States v. Kucik*, 909 F.2d 206, 210-11 (7th Cir. 1990); *United States v. Berberian*, 851 F.2d 236, 239 (9th Cir. 1988); *United States v. Ray*, 768 F.2d 991, 998 n.11 (8th Cir. 1985), *United States v. Pringle*, 751 F.2d 419, 434-35 (1st Cir. 1984); *United States v. Carrasquillo*, 667 F.2d 382, 389 (3d Cir. 1981)).

Defense counsel said he was "trying to tap on the proper channels to authenticate" the "Onited States" bond. J.A. 81-82. Counsel sought "one more adjournment to May 2nd" and a trial date at the "end of the year." J.A. 82.

The court responded, "The end of the year?" J.A. 82. The court found it "very difficult to believe anybody in the Treasury Department will authenticate these bonds and I'm trying to grasp what might be out there." J.A. 84. Counsel said he had consulted a "bond expert" and wanted the opportunity to "digest what my client and others have relayed to me." J.A. 84-85.

The court said, "Well, I don't think I can give you that much time." J.A. 85. The court set a deadline of "April 1st for trial. I may not reach you but I may reach you shortly thereafter. This [case] is a year old. That's enough for a criminal case." J.A. 85.

Defense counsel insisted that he needed until May and reiterated that Zedner "has waived the speedy trial time." J.A. 85. The court responded, "We can't carry a case * * * in this kind of posture forever." J.A. 85. The court set the case "tentatively" for trial on May 5, 1997, "assuming I can free myself up." J.A. 86.[4]

The court entered no order excluding the period from January 31, 1997 to May 5, 1997, from the 70-day clock. The court made no finding that the ends of justice served by this adjournment outweighed the interests of the public in a speedy trial. 18 U.S.C. § 3161(h)(8)(A). And the court

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[4] The next court appearance was on May 2, 1997, rather than May 5, 1997. Accordingly, the period of delay at issue is January 31 to May 2, 1997. *See* J.A. 197.

gave no reason that would have supported such a finding, had it been made. J.A. 192.

The delay from 1997 to 2000

Defense counsel moved to be relieved on May 2, 1997, stating that he could not present the defense Mr. Zedner wanted, namely, that the bond was real. J.A. 192. The court discharged the lawyer. After having Zedner evaluated by a psychiatrist, who found him competent, the court allowed Zedner to represent himself effective September 8, 1997. J.A. 193. Zedner spent the next year serving subpoenas on high-level Government officials. J.A. 193. Then, in October 1998, with Zedner prepared to try the case himself, the court held a competency hearing, found him incompetent, and stayed the commitment order pending appeal. J.A. 193-94. The court of appeals assigned the Federal Defender to represent Zedner, and vacated the incompetency finding because the district court had permitted him to appear *pro se* at the competency hearing. *See United States v. Zedner*, 193 F.3d 562 (2d Cir. 1999) (per curiam); J.A. 194.

The delay from 2000 to 2001

On July 10, 2000, a second competency hearing was held at which the Federal Defender represented Zedner. J.A. 194. The sole witness was a defense psychologist who testified that Zedner was delusional, but competent to be tried if he could cooperate with counsel in the presentation of a lack-of-fraudulent intent defense. J.A. 91-92.

Defense counsel argued that petitioner was competent and requested a trial "as soon as possible," J.A. 90, offering to waive a jury and proceed to a bench trial "immediately." J.A. 98. Counsel noted that, upon a finding of competency, "the trial of this four-year old case can proceed expeditiously." J.A. 98. If, however, Zedner were found incompetent and imprisoned, it would only cause "further delay." J.A. 98.

The Government argued that Zedner could not be tried because his delusions rendered him incompetent. J.A. 100-10. The prosecutor cited Zedner's belief that he was "'the head of a group of people who were managing all of the money in the Federal Reserve'" and that he had been "'entrusted with hundreds of billions of dollars to manage.'" J.A. 103 (quoting defense expert).

The competency proceeding was taken "under advisement" on August 23, 2000, when the final post-hearing memorandum was filed. J.A. 194-95. The court had 30 days to render a decision before the 70-day clock would resume ticking. J.A. 204 n.4.[5]

For reasons the district court never explained, the case then sat idle for the next 195 days, from August 23, 2000 to March 6, 2001.

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[5] *See* 18 U.S.C. § 3161(h)(1)(J) (excluding "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court."), *Henderson v. United States*, 476 U.S. 321, 328-29 (1986) (Act "allows exclusion of up to 30 days while the district court has a motion 'under advisement,' *i.e.*, 30 days from the time the court receives all the papers it reasonably expects * * * * *").

The motion to dismiss the indictment

By March 2001, Zedner had been living under indictment, with bail restrictions, for half a decade. His competency had been *sub judice* since August 2000. Accordingly, on March 7, 2001, Zedner moved to dismiss the indictment pursuant to the Speedy Trial Act and the Sixth Amendment. J.A. 111-27, 195.

On March 21, 2001, the court denied the motion. J.A. 128-36, 195. The court found this single-defendant case "complex"[6] and ruled enforceable the 1996 waiver in perpetuity. J.A. 128-29, 195.[7] The court went on to find Zedner incompetent. J.A. 135-36. This finding was affirmed, *see United States v. Zedner*, 29 Fed. Appx. 711 (2d Cir. 2002), and Zedner was committed to prison for treatment in May 2002. J.A. 196.

The trial and sentence

Government doctors found Mr. Zedner delusional, but competent to proceed, and he was released in August 2002. J.A. 196. His trial finally began on April 7, 2003. J.A. 196.[8]

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[6] The complexity of a case is a factor a court must consider in deciding whether to grant an "ends of justice" continuance *See* 18 U S C. § 3161(h)(8)(B)(ii). However, complexity does not automatically extend the Act's time limits *See* 18 U S C § 3161(h)(8)(A).

[7] The court also held that Zedner had waived his right to dismissal by not moving to dismiss before his trial was scheduled to but did not commence in October 1998. J.A 129 The Act, however, only required him to move for dismissal "prior to trial." 18 U.S.C. § 3162(a)(2). Neither the Government nor the court of appeals relied on this alternative waiver rationale.

[8] The record does not explain the reasons for this final eight-month delay, but petitioner did not challenge it below and does not rely upon it here.

Before trial, the Government announced it would move to dismiss the indictment without prejudice and seek to re-indict Zedner to avoid a speedy trial problem on appeal. J.A. 168-69. The Government then reversed course and proceeded to trial on the original indictment. J.A. 175-78. The prosecutor explained to the court, "I think we will be okay in the Court of Appeals based on your Honor's waiver for all time." J.A. 176.

Defense counsel argued to the jury that Zedner lacked the intent to defraud because his delusions had caused him to believe that his phony bond was genuine. J.A. 196. The prosecutor had successfully opposed trying the case in August 2000, over defense objections to further delay, by citing Zedner's delusions, persuading both the district court and the court of appeals that Zedner was not mentally competent. *See, e.g.*, J.A. 100-10, 129-36. At trial, however, when defense counsel cited these delusions to show Zedner's lack of fraudulent intent, the same prosecutor switched positions and argued, contrary to all the medical evidence (including the report of the Government's own doctors, *see* Trial Tr. at 284-85), that Zedner was faking his delusions. *See id.* at 361-64, 400-01.[9]

Mr. Zedner was convicted and sentenced to 63 months in prison, where he remains. J.A. 197. Because he presented his $10 million bond to six banks, the court found

[9] Zedner argued on appeal that this shift in position was plain error that likely resulted in the conviction of a person who, by reason of mental illness, was innocent. The court of appeals did not discuss this issue in its opinion.

him responsible for an intended loss of $60 million under the Sentencing Guidelines. J.A. 197.[10]

The decision of the court of appeals

On appeal, petitioner argued that the indictment had to be dismissed based on two periods of delay that each exceeded the Speedy Trial Act's 70-day limit: (1) the three-month adjournment that the court afforded defense counsel from January 31, 1997 to May 2, 1997, without making an "ends of justice" exclusion; and (2) the unexplained delay while the competency motion was kept under advisement between August 2000 and March 2001. J.A. 197-98. The court of appeals denied relief as to both periods, but did not rely on the waiver "for all time." The court reasoned, "Th[e] public interest would be undermined if the provisions of the Act intended for the public benefit could be routinely nullified by a defendant's waiver." J.A. 200.

Nevertheless, the court held that Zedner had implicitly waived his right to dismissal based on the 1997 delay because his lawyer had requested this delay to investigate whether the misspelled bond was genuine. J.A. 203-04. No relief was warranted, the court of appeals opined, because this delay was "reasonable" and "could have" been – but admittedly was not (*see* J.A. 192) – excluded from the

[10] The court of appeals remanded for resentencing because the district court apparently misunderstood its authority to depart from the then-mandatory Guideline range based on Zedner's diminished capacity and his argument that the $60 million loss amount overstated the seriousness of the crime. J.A. 216-20. On remand, the district court declined to resentence. The appeal from that decision is currently pending before the Second Circuit.

Speedy Trial Act clock in accordance with the "ends of justice" procedures set forth in 18 U.S.C. § 3161(h)(8)(A). J.A. 203.

The court rejected the Fifth Circuit's rule that a delay granted at the request of the defense is not excludable in the absence of a proper "ends of justice" finding. J.A. 201-02 (discussing *United States v. Willis*, 958 F.2d 60 (5th Cir. 1992)). The court decided that "when a defendant requests an adjournment that would serve the ends of justice, that defendant will not be heard to claim that her Speedy Trial rights were violated by the court's grant of her request, regardless [of] whether the court made an 'ends of justice' finding under § 3161(h)(8)." J.A. 203.

The court of appeals also denied relief based on the 2000-2001 delay. The court held that any violation of the 70-day limit based on this period of inactivity was "harmless error." J.A. 205-09. The Act requires that the "indictment shall be dismissed" upon request, either with or without prejudice to further prosecution, whenever the 70-day limit is violated. 18 U.S.C. § 3162(a)(2). Nevertheless, the court held that "harmless error analysis is appropriate in Speedy Trial Act cases" because "[t]here are excellent reasons to distinguish between errors under the Speedy Trial Act that are harmless and those that are harmful." J.A. 207.

The court held that petitioner had not shown that this 195-day delay "prejudiced him at his trial." J.A. 209. The court added that, because petitioner was found incompetent after this delay, he could not have been tried during this period. J.A. 204-05. This rationale, however, does not justify the district court's failure to resolve the competency issue promptly. If the court had decided the issue

expeditiously, petitioner would have been treated for his incompetency and tried many months sooner.[11]

SUMMARY OF ARGUMENT

The Speedy Trial Act sets forth a comprehensive framework to ensure the prompt disposition of federal prosecutions. The Act is "plain-speaking." *United States v. Blackwell*, 12 F.3d 44, 46 (5th Cir. 1994). It provides that "[i]n any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days* * * *" 18 U.S.C. § 3161(c)(1). If the defendant is not brought to trial within this time frame (plus any excludable time under Section 3161(h)), the "indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). The Act further specifies that any delay resulting from a continuance granted at the request of the defendant, his counsel, or the prosecutor counts towards the 70-day limit unless the judge "granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A).

I. In this case, the district court and the Government abdicated their statutory responsibility to ensure that all defendants are tried promptly, even if they would prefer to postpone the day of judgment. The district court effectively

[11] The court of appeals also noted that defense counsel had a difficult pregnancy as of late November 2000 and was on parental leave some time later J.A. 195, 204-09. The district court never cited this as a basis for the delay and there is no evidence the court was aware of the pregnancy at the time. J.A. 195 n.2.

nullified the Speedy Trial Act by securing and enforcing an invalid speedy trial waiver "for all time." As every court of appeals to address the issue had held, *see* p. 6 n.3, *supra*, and as the Government acknowledged to this Court in 1994,[12] such waivers are ineffective. The text, structure and history of the Act make clear that the statute does not bestow upon a defendant a personal right that is his or hers alone to waive. Rather, the Act protects an important public interest in the prompt administration of justice that transcends – and is often adverse to – the interests of individual litigants. Allowing waivers would therefore frustrate the Act's central purpose of protecting society's interest in swift justice whether or not prosecutors or defendants perceive speed to be in their interest. *See United States v. Willis*, 958 F.2d 60, 63 (5th Cir. 1992) ("The Act's central intent to protect society's interests requires that a defendant's purported waiver of his rights under the Act be ineffective to stop the speedy trial clock from running.").

The court of appeals was therefore correct not to enforce petitioner's purported waiver "for all time." But the court erred by declining to order dismissal of the indictment, as the Act mandates. The court improperly created an exception to the Act that does violence to its text. The court held that a judge need not make an "ends of justice" finding under Section 3161(h)(8)(A) when a defendant requests an adjournment, as long as the appellate court later ratifies the adjournment as proper. J.A.

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[12] At oral argument in *United States v. Mezzanatto*, 513 U.S. 196 (1995), the Government cited the Speedy Trial Act as an example of a statute that could not be waived. *See* Transcript of Oral Argument, *Mezzanatto*, 1994 WL 757606 (No. 93-1340).

203. This holding contradicts the plain language of the Act, which states that "[n]o * * * period of delay" resulting from a continuance granted at the request of the defendant or his counsel "shall be excludable" unless the continuance was granted based on the court's "findings[,]" supported by reasons set forth "orally or in writing," that the need for delay outweighs the public's interest in a speedy trial. 18 U.S.C. § 3161(h)(8)(A). By disregarding this unambiguous text, the court of appeals violated this Court's "cardinal canon" of statutory construction: "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Neither petitioner's purported waiver "for all time" nor his lawyer's request for a three-month adjournment in 1997 was effective to toll the Act's time limits. Accordingly, this 90-day delay exceeded the Act's 70-day time limit and the indictment must be dismissed. 18 U.S.C. § 3162(a)(2).

II. The court of appeals further erred by holding that a violation of the Act's 70-day time limit for bringing an indicted defendant to trial is subject to harmless-error analysis. The plain language of the dismissal provision, Section 3162(a)(2), requires dismissal of the indictment for any violation, even where no harm results. The presence or absence of harm is a factor to be considered along with the other statutory factors "[i]n determining whether to dismiss the case with or without prejudice* * * *" 18 U.S.C. § 3162(a)(2). But the absence of harm is not a factor that permits a court to disregard the dismissal sanction altogether.

Applying harmless-error analysis thus violates the unambiguous "shall be dismissed" language of the Act. *See*

United States v. Taylor, 487 U.S. 326, 332 (1988) ("[T]he statute admits no ambiguity in its requirement that when * * * a violation [of the 70-day period] has been demonstrated, 'the information or indictment shall be dismissed on motion of the defendant.'") (quoting 18 U.S.C. § 3162(a)(2)). In effect, by holding that harmless-error analysis applies, the court interpreted the statutory directive, "the indictment shall be dismissed," to mean that "the indictment shall *not* be dismissed, unless harm has been shown." The court had no authority to so re-write the statute.

Performing harmless-error analysis also disregards the history and purpose of the dismissal provision. The mandatory dismissal provision was not enacted to prevent prejudice to any particular defendant. Rather, its purpose was to deter prosecutors and courts throughout the federal system from violating the 70-day limit. Applying harmless-error analysis on a case-by-case basis undermines the provision's deterrent effect and erodes the Act's bright-line time limit.

Finally, the court's decision to apply harmless-error analysis conflicts with this Court's unanimous decision in *Alabama v. Bozeman*, 533 U.S. 146 (2001). In *Bozeman*, the Court interpreted similar "shall be dismissed" language in another speedy trial statute, the Interstate Agreement on Detainers, 18 U.S.C. App. 2 § 2 (1970), to preclude harmless-error analysis. *Bozeman* rejected the position, adopted here by the court of appeals, that the general harmless-error provisions of 28 U.S.C. § 2111 and Fed. R. Crim. P. 52(a) override the specific mandatory dismissal sanction contained in the statute itself.

In sum, a violation of the Act's 70-day time limit for bringing an indicted defendant to trial is not subject to harmless-error analysis. The judgment below therefore cannot stand.

ARGUMENT

I. A defendant may waive the requirements of the Speedy Trial Act only as the statute specifically permits.

A. Waiver of a statutory right is not permitted where waiver would contravene the statute's text, structure and purpose.

The Court generally "presume[s] that statutory provisions are subject to waiver by voluntary agreement of the parties." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). However, a "right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945) (quoted in *New York v. Hill*, 528 U.S. 110, 116 (2000)). Waiver of a statutory right is not allowed where there exists "some affirmative indication of Congress' intent to preclude waiver." *Mezzanatto*, 513 U.S. at 201. For example, "an express waiver clause may suggest that Congress intended to occupy the field and to preclude waiver under other, unstated circumstances." *Ibid.* (citing *Crosby v. United States*, 506 U.S. 255 (1993); *Smith v. United States*, 360 U.S. 1 (1959)). Similarly, even where a statute is silent with respect to waiver, its text, structure, legislative history and underlying purposes may be inconsistent with waiver. *See Brooklyn Sav. Bank*, 324 U.S. at 705-06 (holding statute non-waivable after consulting its

"legislative policy * * * as evidenced by [the statute's] legislative history and the provisions in and structure of the [statute]"); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (waiver not permitted where it "would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate") (quoting *Brooklyn Sav. Bank*, 324 U.S. at 707).

As we now show, the Speedy Trial Act does not create a personal right that may be waived. Rather, the Act creates a public right that courts must protect even when – indeed, especially when – the litigants are content to delay the proceedings.

B. Permitting waiver of the Speedy Trial Act's 70-day time limit is inconsistent with the Act.

The district court held that a defendant may waive his rights under the Speedy Trial Act "for all time." J.A. 128-29. The court of appeals did not embrace that view, but held that a defendant waives the right to obtain dismissal by seeking delay that "could have" been excluded from the Act's 70-day time limit. J.A. 203. Recognizing either type of waiver, however, contravenes the Act's text, structure, and central purpose.

The Speedy Trial Act was enacted, first and foremost, to protect the public interest in swift justice. Congress determined that systemic delays had triggered a "crisis in the criminal justice system." S. Rep. No. 93-1021, at 6 (1974) ["1974 Senate Report"]. The fault was shared by all of the key participants in the system. Congress found that "[j]udges, prosecutors, and defense counsel in many jurisdictions have come to depend upon delay to cope with

their workloads." *Id.* at 9. There was "no effective statutory or constitutional incentive" for "judges, defense attorneys and prosecutors to come to grips with their own inefficiency." *Ibid.* Congress decided that speedy trials had to be "statutorily mandated upon the system from the outside[.]" *Ibid.*

Congress found that long delays were permitting defendants to remain free on pre-trial release for extended periods, where they could commit new offenses. The preamble of the Speedy Trial Act describes the statute as, "An Act [t]o assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial, and for other purposes." Pub. L. No. 93-619, 93rd Cong., 88 Stat. 2076 (Jan. 3, 1975), *reprinted in* A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974* 375 (Fed. Judicial Center 1980) ["Partridge"]. The 1974 House Report likewise states that "[t]he purpose of this bill is to assist in reducing crime and the danger of recidivism by requiring speedy trials." H.R. Rep. No. 93-1508, at 8 (1974).

Thus, in enacting the Speedy Trial Act, Congress determined that litigants could not be relied upon to further the public interest in swift justice. The 1974 Senate Report noted that "[o]nly very rarely is it in the defendant's interest to seek speedy trial, for in most cases it is the last thing he wants." 1974 Senate Report at 14. As Senator Ervin, the bill's principal sponsor in the Senate, explained:

> Unfortunately, while it is in the public interest to have speedy trials, the parties involved in the criminal process do not feel any pressure to go to trial. * * * The overworked courts, prosecutors, and defense attorneys depend on delay in order

> to cope with their heavy caseloads. * * * To them, there is little incentive to move quickly in what they see as an unending series of cases. The defendant, of course, is in no hurry for trial, because he wishes to delay his day of reckoning as long as possible.

120 Cong. Rec. 41618 (1974) (remarks of Sen. Ervin), *quoted in* Partridge at 16.

The conflict between the litigants' practice of delay and the public's interest in prompt trials was a constant theme throughout the Act's development and subsequent amendment. *See, e.g.*, S. Rep. No. 96-212, at 6 (1979) ["1979 Senate Report"] ("Practically speaking, in a memory dependent system, it may better serve the defendant's interest in avoiding conviction to create unreasonable delay. The ramifications are highly prejudicial to the public interest."); *id.* at 6-7 (the Act "reflects the legislative judgment that * * * the societal interest in prompt administration of justice * * * require[s] * * * that criminal cases be tried within a fixed period coupled with meaningful penalties for failure to do so.").

It is antithetical to the statute's purpose to permit courts, prosecutors and defense counsel – the very actors the Act was designed to regulate – to "opt out" of the statute through the simple expedient of a defendant signing a waiver. *See, e.g.*, *Willis*, 958 F.2d at 63 ("Allowing the defendant to waive the Act's provisions would compromise the public interest in speedy justice. In the vast majority of cases, the defendant will be quite happy to delay the final determination of his guilt or innocence.").

Permitting waiver is also inconsistent with the comprehensive and detailed structure of the Act. The statute

sets forth a highly reticulated framework that mandates that all federal cases be tried within a fixed period of time. The Act requires that "[i]n any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days," plus carefully drawn excludable time periods. 18 U.S.C. § 3161(c)(1) & (h). The specific indictment-to-trial time limit was selected on the basis of studies showing "the amount of time it takes an individual who is on bail to be rearrested for a subsequent crime." 1974 House Report at 14; *accord* 1974 Senate Report at 8. The choice of the 70-day time limit thus confirms Congress's overriding aim of protecting the public. Allowing defendants to extend the time limit via a waiver would undermine this goal.

Significantly, the Act's mandatory dismissal provision contains no exception for delays that are caused or invited by the defendant or his counsel. Congress knew how to include such exceptions. Section 3164 of the Act, for example, makes the sanction for a violation of the 90-day time limit for "high risk" defendants inapplicable where the delay was the "fault of the accused or his counsel." 18 U.S.C. § 3164(c); *see also* 18 U.S.C. § 5036 (West 2005) (providing exceptions to speedy trial dismissal provision for juveniles if the delay was "caused by" or "consented to by the juvenile and his counsel").

Congress's decision not to include a similar "fault" exception for a violation of the Act's 70-day time limit was deliberate. The original Senate bill would have required dismissal only if the failure to bring the defendant to trial in time was "through no fault of his own or his counsel." S. 895, 92d Cong., 1st Sess. (1971). The 1972 Senate subcommittee bill dropped this reference to "fault" at the

request of the Department of Justice. *See* Comments on S. 895 in Letter to Sen. Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 255-56 (1971) ["1971 Senate Hearings"] ("We suggest that the concept of 'fault' be entirely eliminated and that the test be simply one of whether the time limitation has been exceeded."), *quoted in* Partridge at 198; 1974 Senate Report at 43 ("[A]t the suggestion of the [Justice] Department, S. 754 would eliminate the requirement, contained in S. 895, that to succeed on the dismissal motion the defendant must show lack of fault for the delay."). The Court should not override this considered legislative judgment by reinserting a fault exception into the Act.

Allowing waiver is also inconsistent with other provisions of the Act. The "ends of justice" provision, Section 3161(h)(8), permits a court to grant a continuance that does not count towards the 70-day time limit if certain statutory factors are considered and certain procedures are followed. The provision states, however, that "[n]o * * * period of delay" resulting from a continuance granted "at the request of the defendant or his counsel" – or at the prosecutor's request – "shall be excludable" unless the court sets forth, "in the record," "its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). It is clear from this provision that a defendant's assent to delay, standing alone, has no effect on the running of the Act's time limits.

Accordingly, this provision – "the heart of the speedy trial scheme," 1974 Senate Report at 39 – states a "no

waiver" rule. It makes clear that delay is not excludable simply because the defendant, the prosecutor, and the court agree that delay is convenient. Rather, the court must determine, after considering the appropriate statutory factors, that the need for delay "outweigh[s]" the public interest in prompt disposition. *See United States v. Ramirez-Cortez*, 213 F.3d 1149, 1154, 1156 (9th Cir. 2000) (the Act's "ends of justice" provision is inconsistent with waiver); Committee on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended* (Dec. 1979 rev., with amendments through Oct. 1984), 106 F.R.D. 271, 300 (1984) ["*Speedy Trial Act Guidelines*"] ("The Committee believes that this ['ends of justice'] provision, considered in light of the legislative purpose underlying the Act, makes it clear that a defendant's proffer or willingness to 'waive' his rights * * * cannot justify any deferral of the trial date beyond the statutory deadline that would otherwise apply.").

The Act also explicitly permits waiver in specific circumstances, suggesting that Congress intended to "occupy the field." *Mezzanatto*, 513 U.S. at 201. For example, the Act allows a defendant to speed up the trial by waiving the right, under 18 U.S.C. § 3161(c)(2), to be tried no sooner than 30 days after the first appearance with counsel. *See* 18 U.S.C. § 3161(c)(2) ("Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se."). In contrast, the Act contains no comparable waiver provision where the defendant wishes to delay the trial beyond the 70-day limit of Section 3161(c)(1). The marked contrast between

these adjacent subsections of the same statute demonstrates that the 70-day limit is not waivable. As the Court has held, "[W]hen 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Similarly, the Act provides only one way for a defendant to waive the right to obtain dismissal based on a violation of the 70-day time limit, *i.e.*, by not moving for dismissal before trial. 18 U.S.C. § 3162(a)(2) ("Failure of the defendant to move for dismissal prior to trial * * * shall constitute a waiver of the right to dismissal under this section."). Had Congress intended to allow waiver in other ways, it would surely have said so. *See Barnhart*, 534 U.S. at 454 ("If Congress meant to make a preenactment successor in interest * * * liable, it could have done so clearly and explicitly.").

The 1979 Senate Report, issued in connection with the 1979 Amendments to the Act, confirms, forcefully, that this explicit waiver provision in Section 3162(a)(2) was meant to be exclusive. That Report contains a section entitled "Waiver." 1979 Senate Report at 28-30. It states that "[t]he sole reference to waiver in the Act appears in § 3162(a)(2)[.]" *Id.* at 29. The Report then declares:

> The Committee wishes to state, in the strongest possible terms, that any construction which holds that any of the provisions of the Speedy Trial Act is waivable by the defendant, other than his statutorily-conferred right to move for dismissal as cited above, is contrary to legislative intent

> and subversive of [the Act's] primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial.

Ibid.

The Report also rejected specific arguments that had "been advanced to justify the use of waiver[.]" *Ibid.* For example, the Report dismissed the argument that "[w]aiver of the speedy trial guarantees established by the Act is properly inferred from the defendant's ability to waive the Sixth Amendment right to speedy trial." *Ibid.* The Report explained that

> the Act seeks to protect and promote speedy trial interests that go beyond the rights of the defendant; although the Sixth Amendment recognizes a societal interest in prompt dispositions, it primarily safeguards the defendant's speedy trial right – which may or may not be in accord with society's. Because of the Act's emphasis on that societal right, a defendant ought not be permitted to waive rights that are not his or hers alone to relinquish.

Ibid.

This expression of legislative intent is clear: The narrow waiver provisions of the Act are exclusive. *See, e.g.*, *United States v. Lloyd*, 125 F.3d 1263, 1268 n.7 (9th Cir. 1997); *Saltzman*, 984 F.2d at 1091; *Carrasquillo*, 667 F.2d at 389.

Other textual features of the Act confirm its non-waivability. The 70-day time limit, for example, applies automatically to "any case" in which the defendant pleads not guilty. 18 U.S.C. § 3161(c)(1). No demand for a speedy

trial is required to trigger the clock. This "no demand" feature of the Act reinforces the conclusion that the 70-day time limit is not a personal right that may be relinquished. *See* 1979 Senate Report at 7 ("Taken together, the 'day certain' scheduling requirement and 'starting the clock' at identifiable points in the criminal justice process, whether or not the defendant demands trial, reflect the importance attached by Congress to the enforcement of the public's and the defendant's * * * right to speedy trials.").

The Act also permits a dismissal "without prejudice." This flexibility to allow reprosecution accommodates the non-waivability of the 70-day limit. A court is to consider the defendant's conduct in causing or inviting delay as one of the "facts and circumstances of the case" that counsels in favor of permitting reprosecution in the event of a violation. 18 U.S.C. § 3162(a)(2); *see Taylor*, 487 U.S. at 340, 343 (the defendant's "contribution to the delay" is to be considered in determining the nature of the dismissal). Accordingly, no unduly harsh consequences to the public flow from the non-waivability of the Act's 70-day time limit.

Further, the comprehensive structure of the Speedy Trial Act is inconsistent with waiver. The Act specifies nine separate and intricately described types of delay that are excluded from the 70-day limit. *See* 18 U.S.C. § 3161(h)(1)-(9). The broadest of these nine categories, the "ends of justice" exclusion, covers such diverse situations as plea bargaining, cooperation by the defendant, and the need for reasonable preparation by defense counsel. The Act's list of exclusions is so extensive in number and broad in scope as to compel the conclusion that it was intended to exhaust the permissible reasons for delay. *See, e.g.*, *Carrasquillo*, 667 F.2d at 388 ("[T]he list is exclusive.").

And the "ends of justice" provision makes waiver unnecessary when the legitimate need for further extension of time outweighs the public interest in proceeding expeditiously. In such a case, a court need only make the required finding. 18 U.S.C. § 3161(h)(8)(A). "It would be inconsistent with the statutory scheme to permit a defendant, through a purported 'waiver,' to relieve the court of this obligation." *Saltzman*, 984 F.2d at 1091 (quoting *Speedy Trial Act Guidelines*, 106 F.R.D. at 300).

Holding the Speedy Trial Act's 70-day time limit nonwaivable is thus fully consistent with this Court's decision in *Hill*. There, the Court held that a defendant, by seeking delay, could waive the right to be tried within the time limits of the Interstate Agreement on Detainers ("IAD"). 528 U.S. at 118.[13] The Court explicitly left open whether the time limits of the Speedy Trial Act could be waived. *Id.* at 117 n.2. The Court noted, however, that the Speedy Trial Act has several features that distinguish it from the IAD. For example, the Act's time limits begin to run automatically rather than upon request, dismissal under the Act may be without prejudice, and the Act includes express waiver provisions covering limited circumstances. *Ibid.*

In addition to these distinctive features, the Speedy Trial Act protects an important public interest – crime prevention – that the IAD does not. As *Hill* noted, the IAD applies to incarcerated prisoners who are being transferred from one jurisdiction to another. For that reason, "society's interests in assuring the defendant's presence at

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[13] *Hill* did not involve a waiver "for all time." *See Hill*, 528 U.S at 115 ("This case does not involve a purported * * * waiver of all protection of the IAD's time limits or of the IAD generally * * * * * ").

trial and in preventing further criminal activity (or avoiding the costs of pretrial detention) [were] simply not at issue." *Id.* at 117. The Speedy Trial Act, in contrast, was passed principally to address these very concerns. The public interest in speed is thus far greater under the Act than under the IAD.

In summary, the text, structure, history and purpose of the Speedy Trial Act provide "affirmative indication" of Congress's intent to preclude waiver of the 70-day time limit. *Mezzanatto*, 513 U.S. at 201. Waiver is properly found only where the defendant fails to move for dismissal before trial. 18 U.S.C. § 3162(a)(2).

C. The purported waivers relied upon by the courts below were ineffective to toll the Act's 70-day time limit.

As shown, the Act's 70-day time limit is not a personal right that may be waived. Accordingly, the court of appeals rightly refused to enforce the district court's waiver "for all time." It erred, however, by declining to order dismissal of the indictment based on the 90-day delay in 1997.

It is undisputed that the adjournment from January through May 1997 was not based on a finding that the need for the delay outweighed the public's interest in a speedy trial. On the contrary, the court's remarks suggest that it believed that no further delay served the public interest. *See, e.g.*, J.A. 85 ("This [case] is a year old. That's enough for a criminal case.").

Nevertheless, the court of appeals held dismissal was not required because the delay "could have" been excluded pursuant to the Act's "ends of justice" provision. J.A. 203.

Under the Circuit's holding, a continuance granted at the defendant's request does not count for speedy trial purposes, whether or not an "ends of justice" exclusion was actually made, so long as it "could have been" made. J.A. 203.

This holding should be reversed. Even if the district court "could have" granted an "ends of justice" exclusion for this 90-day period, it did not do so. The statute says that no period of delay "shall be excludable" – even if the defense wants it – unless the court actually "sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). The district court's failure to comply with this provision means that the delay counts toward the 70-day limit. As this Court reiterated just last Term, judges "are not free to rewrite the statute that Congress has enacted." *Dodd v. United States*, 125 S. Ct. 2478, 2483 (2005).

The court of appeals also erred by opining that the public interest would not be served by allowing defendants to obtain dismissal based on delays they caused or invited. J.A. 203. As discussed, Congress decided to delete language that would have made dismissal contingent on the absence of fault. *See* pp. 22-23, *supra*. The court of appeals was bound to accept that considered congressional judgment. Any "fault" exception to the Act, if needed, must be added by Congress. *See, e.g., Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 377 (1990) ("identification of any exception should be left to Congress"); *Willis*, 958 F.2d at 64 ("If Congress is troubled by the effects of the dismissal remedy in these cases, it may provide an additional

exception under the Act for continuances requested by defendants. Until that time we are bound by the provisions of the Act.").

Judicial tinkering with the Speedy Trial Act is especially ill-advised because creating exceptions to the Act's "no waiver" rule threatens to engulf the rule. *See, e.g.*, *Guidry*, 493 U.S. at 377 (no exception should be made by the Court where it would be too difficult to "carve out an exception that would not swallow the rule"). Some courts, for example, hold that a defendant may not obtain dismissal based on a continuance he requested. *See, e.g.*, *Kucik*, 909 F.2d at 211. This approach, however, consumes the rule against waiver. As the Fifth Circuit has recognized, "holding that the provisions of the Act are non-waivable would be meaningless if we adopted the rule that the defendant waives his ability to move for dismissal of the indictment simply by asking for or agreeing to a continuance." *Willis*, 958 F.2d at 64.

Some courts have also expressed concern that enforcing the statute as written could invite "sand-bagging" by defendants. *See Kucik*, 909 F.2d at 211; *Pringle*, 751 F.2d at 434. But the answer to this concern is for the Court to reaffirm the bright-line rule set forth in the statute itself: Continuances granted at the request of the defense are not excludable unless they are based on a proper "ends of justice" analysis. The clarity of this straightforward rule will make "sand-bagging" impossible because courts and prosecutors will know that a waiver by the defense does not create excludable delay. *See Blackwell*, 12 F.3d at 48 ("[We] provid[e] a bright line for the district courts to follow. In the absence of contemporaneous, articulated on-the-record findings for extending the time for trial past seventy days amounting to an acceptable ends of justice

analysis, Defendant-Appellant is entitled to have his case dismissed.").[14]

In any event, there was no "sand-bagging" by the defense here. There is no evidence that Zedner's lawyer sought the 90-day adjournment in 1997 to create a speedy trial "trap." On the contrary, he wanted more time to prepare and apparently believed the court when it said that a speedy trial waiver "for all times" was valid. J.A. 73. Moreover, it was the court, not the defense, that proposed the waiver. As the Fifth Circuit has held, "A district court is not sandbagged or otherwise misled * * * by a defendant's simple request for or acquiescence in a continuance and its own insistence upon a waiver." *Willis*, 958 F.2d at 64.

The court of appeals was also wrong to conclude that, "[g]iven the complexity of the case and Zedner's reasonable need for additional preparations, there can be no doubt that the district court could have properly excluded this [90-day] period of time based on the ends of justice." J.A. 203. This single-defendant case was not complex; it took only a week to try. The three-month adjournment granted on January 31, 1997, moreover, was far from "reasonable." That adjournment was granted to allow counsel more time to investigate whether the $10 million "Onited States" bond, purportedly issued by the "Ministry of Finance of U.S.A.," was genuine. At that point, this case had already been pending for more than nine months, and the court failed to inquire into counsel's "due diligence" during that period.

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[14] The Act specifically authorizes the imposition of monetary and other sanctions for misconduct by defense counsel. *See* 18 U.S.C. § 3162(b).

See 18 U.S.C. § 3161(h)(8)(B)(iv) (in considering an "ends of justice" exclusion, the court must "tak[e] into account the exercise of due diligence."). And there was no possibility that the misspelled bond was genuine, as the court and the prosecutor recognized at the time the adjournment was granted. J.A. 81-86. Accordingly, it is hard to see, even hypothetically, how the court could have legitimately determined that counsel's desire for delay outweighed the public's interest in prompt disposition.

For all of these reasons, the Court should hold that the requirements of the Speedy Trial Act may be waived only in the limited circumstances the Act specifies. Because the 90-day adjournment in 1997 itself exceeded the Act's 70-day time limit, the judgment below should be reversed and the case remanded for dismissal of the indictment, with or without prejudice.

II. A violation of the Speedy Trial Act's 70-day time limit is not subject to harmless-error analysis.

The second issue presented by this case is whether a violation of the 70-day time limit for bringing a defendant to trial is subject to harmless-error analysis. The answer is "no." The text of the Act says that, if a defendant is not brought to trial within 70 non-excludable days, "the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). This language is unambiguous, mandatory, and absolute. *See United States v. Taylor*, 487 U.S. 326, 332 (1988). By specifying dismissal as the mandatory sanction for any violation of the 70-day limit, the Act embodies a legislative judgment that such a violation affects the public's substantial right to expeditious criminal proceedings. Accordingly, harmless-error

analysis is inapplicable. Instead, the Act grants courts flexibility to dismiss without prejudice to reprosecution, where appropriate. *See id.* at 343.

A. Harmless-error analysis does not apply where a statutory timing provision mandates the sanction of dismissal for a violation.

Where a statutory timing provision specifies that the indictment "shall be dismissed" in the event of a violation, courts do not have discretion to ignore that command. *See Alabama v. Bozeman*, 533 U.S. 146 (2001); *United States v. Taylor*, 487 U.S. 326 (1988).

The pertinent text of the dismissal provision of the Speedy Trial Act is clear. It provides, "If a defendant is not brought to trial within the [70-day] time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). The Court recognized the clarity of this command in *Taylor*. Although the issue in *Taylor* was how a district court should decide whether dismissal of an indictment under this provision should be with or without prejudice to reprosecution, the Court also addressed the antecedent question of whether the Act mandates that a violation of the 70-day limit must result in a dismissal. The answer was simple. As the Court declared, "[T]he statute admits no ambiguity in its requirement that when such a violation has been demonstrated, 'the information or indictment shall be dismissed on motion of the defendant.'" *Taylor*, 487 U.S. at 332 (quoting 18 U.S.C. § 3162(a)(2)). The Court recognized that the Act "mandat[es] dismissal of the indictment upon violation of precise time limits." *Taylor*, 487 U.S. at 343-44; *accord id.*

at 341 n.12 ("If the Government fails to try the defendant within the statutory time frame, the defendant is entitled to dismissal."). The Court added, "As is plain from this language, courts are not free simply to exercise their equitable powers in fashioning an appropriate remedy* * * *" *Id.* at 333. It follows, then, that courts cannot simply decide, on harmless-error grounds, to ignore the statute's text and impose no remedy at all.[15]

In *Alabama v. Bozeman*, this Court considered dismissal language almost identical to that here and held that it left no room for harmless-error analysis. *Bozeman*, 533 U.S. at 153-54. *Bozeman* concerned the Interstate Agreement on Detainers ("IAD"), 18 U.S.C. App. 2 § 2 (1970). The IAD contains an "anti-shuttling" provision that provides, in pertinent part, that a state that obtains a prisoner for purposes of trial must try that person within 120 days of arrival and that, if the receiving state returns the prisoner to the sending state prior to that trial, the "indictment * * * shall not be of any further force or effect, and the court shall enter an order dismissing the same

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[15] Accordingly, ten circuits have held that dismissal is mandatory. *United States v. Hastings*, 847 F.2d 920, 924 (1st Cir. 1988); *United States v Brenna*, 878 F 2d 117, 118 (3d Cir 1989) (per curiam); *United States v. Jones*, 887 F.2d 492, 494 (4th Cir 1989); *United States v. Johnson*, 29 F 3d 940, 945 (5th Cir. 1994); *United States v Dunbar*, 357 F.3d 582, 591 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1099 (2005), *United States v. Koory*, 20 F.3d 844, 846 (8th Cir 1994); *United States v Lewis*, 349 F.3d 1116, 1120 (9th Cir. 2003); *United States v. Doran*, 882 F.2d 1511, 1517 (10th Cir. 1989), *United States v. Stafford*, 697 F.2d 1368, 1371 (11th Cir. 1983); *United States v Garrett*, 720 F.2d 705, 707 (D C. Cir. 1983). One circuit has joined the Second Circuit in holding that a violation of the 70-day limit can be harmless. *United States v. Smith*, 415 F.3d 682, 686 (7th Cir. 2005), *petition for cert filed*, [U.S. Oct. 13, 2005] (No. 05-7009).

with prejudice." 18 U.S.C. App. 2 § 2, Article IV(e); *see Bozeman*, 533 U.S. at 148-49.

The Court held that this "absolute language" required dismissal of the indictment – "with prejudice" – even though the prisoner in that case had already been tried and convicted, and even though he had been returned to the sending state after only a single day. *Bozeman*, 533 U.S. at 153-54. The Court rejected Alabama's position, echoed by the court of appeals here, that a violation could be overlooked on policy grounds as "*de minimis*, technical, or harmless." *Id.* at 156. The Court reasoned that "the language of the Agreement militates against an implicit exception, for it is absolute." *Id.* at 153. As the Court noted, the statute states that the court "shall" enter an order dismissing the indictment, and "'[t]he word "shall" is ordinarily "the language of command."'" *Ibid.* (quoting *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (quoting in turn *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)). The Court added that "[t]he cases Alabama cites as supporting a 'harmless error' construction involved statutes that lacked this absolute language." *Bozeman*, 533 U.S. at 153-54 (citing, *inter alia*, *United States v. Montalvo-Murillo*, 495 U.S. 711, 716-17 (1990) (Bail Reform Act "is silent on the issue of a remedy for violations of its time limits")).[16]

The reasoning of *Bozeman* demonstrates that harmless-error analysis is inapplicable to a violation of the Speedy Trial Act's 70-day time limit. The IAD and the

[16] Similarly, the harmless-error cases cited below by the court of appeals concerned violations of the 30-day minimum trial preparation period guaranteed by Section 3161(c)(2), a provision that does not contain a sanction for its violation, as the court itself acknowledged. J.A. 206-07.

Speedy Trial Act both provide time frames in which the Government must bring criminal defendants to trial. Although the two statutes differ with respect to waiver, *see* pp. 28-29, *supra*, they contain very similar language concerning remedy. Like the mandatory dismissal provision of the IAD at issue in *Bozeman*, the pertinent language of the Speedy Trial Act is "absolute." It says that, if the 70-day period is exceeded, the "indictment shall be dismissed." 18 U.S.C. § 3162(a)(2). Accordingly, just as with a violation of the IAD, a violation of the 70-day time limit of the Speedy Trial Act cannot be harmless.

The court of appeals erroneously relied upon the general harmless-error provisions of 28 U.S.C. § 2111 and Fed. R. Crim. P. 52(a), which state that errors that do not affect "substantial rights" should be disregarded. Nothing in these provisions supplants the Act's specific language mandating dismissal. Rule 52(a) and Section 2111, provisions of general application, do not permit a court to disregard the specific remedy mandated by the Speedy Trial Act itself. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific [provision] governs the general* * * *"). Indeed, the Government cited Section 2111 and Rule 52(a) to this Court in *Bozeman* to support the application of harmless-error analysis in that case, but not a single Justice was persuaded. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioner at 23, *Bozeman*, 533 U.S. 146 (No. 00-492).

In addition, a violation of the Act is unlike the trial-type errors normally associated with the harmless-error doctrine. As already discussed, the Act was not enacted primarily to protect the rights of the parties or to ensure a reliable verdict at trial. Rather, it vindicates a broad

societal interest in expeditious proceedings. *See* pp. 19-21, 25-26, *supra*. That is the "substantial right" the Act is designed to protect. Thus, any violation of the Act's 70-day time limit requires dismissal of the indictment upon timely motion by the defendant.

B. Harmless-error analysis is inconsistent with the remedial framework of the Act.

Harmless-error analysis is also inconsistent with the remedial framework constructed by Section 3162(a)(2). After stating that in the case of a violation the "indictment shall be dismissed," this provision goes on to give the court the alternatives of dismissing "with or without prejudice" to reprosecution. 18 U.S.C. § 3162(a)(2). In making that determination, "the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." *Ibid.*

The Court recognized in *Taylor* that these factors are not relevant to the threshold inquiry of whether the indictment must be dismissed; that question is purely a matter of arithmetic because the statute "mandat[es] dismissal of the indictment upon violation of precise time limits * * * * " 487 U.S. at 344. By contrast, injury to the defendant does play a role in the next step of the process, the determination of whether the dismissal is to be with or without prejudice. *Taylor* held that prejudice is to be considered at that stage. *Id.* at 342 ("[A]bsence of prejudice" is a "consideration in favor of permitting reprosecution."). In short, the language and structure of the Act

make plain that Congress decided to impose a sanction for violations of the time limit even when the damage is to the public interest rather than to the defendant personally.

The Second Circuit's approach would distort this structure by making the presence or absence of prejudice relevant not just to the nature of the remedy but also to the question of whether dismissal is required at all. This approach would render surplus much of the dismissal provision. Specifically, the court of appeals found any violation of the Act harmless here because petitioner "failed to put forth any convincing argument that this delay prejudiced him at his trial." J.A. 208-09. But this Court has already determined in *Taylor* that lack of prejudice to the defendant's ability to try his case goes only to whether the dismissal should be with or without prejudice, and "is not dispositive" even on that question. 487 U.S. at 341. By setting a standard under which the lack of prejudice precludes any remedy, the Second Circuit's approach flatly contradicts Section 3162(a)(2), which by its terms permits a dismissal, even with prejudice, when the defendant is not harmed, based upon the totality of the other factors it lists, or, as *Taylor* notes, upon the "bad faith" or a "pattern of neglect" by the Government. *Id.* at 339. Thus, while an absence of prejudice may properly contribute to a decision to dismiss without prejudice, this single factor cannot serve to preclude any remedy at all. For that matter, dismissal without prejudice is itself a central feature of the Act, and the court of appeals should not have attempted to read it out of the statute.[17]

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[17] The Second Circuit's other basis for finding harmless error was its claim that the district court's delay in resolving the competency issue from August 2000 to March 2001 did not delay the trial because

(Continued on following page)

C. The history and purpose of the dismissal provision do not support the application of harmless-error analysis.

Not only do the text and structure of the Act mandate dismissal for any violation of the 70-day limit, the history and purpose of the dismissal provision confirm that harmless-error analysis is not appropriate.

Congress did not intend for a dismissal without prejudice to somehow cure or erase a delay in any specific case. Rather, Congress chose mandatory dismissal, with or without prejudice, as a necessary sanction to protect the public interest by deterring violations of the 70-day time limit prophylactically. Evaluating each period of delay for harmlessness would chip away at the deterrent effect and at the bright-line rule that Congress prescribed for determining whether a trial was "speedy." *See Willis*, 958 F.2d at 64 ("Congress's intent in providing for the dismissal sanction was 'to serve as a deterrent for the failure of the

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petitioner was ultimately found incompetent and because defense counsel was experiencing a difficult pregnancy in late November 2000, and was on parental leave some time later J A 195, 204-09

As for the first claim, petitioner was returned to court competent and ready for trial after testing and treatment. J.A. 196. If the district court had made a timely decision as to competency in 30 days, instead of delaying for 195 days, that treatment would have occurred some 5½ months earlier, and the trial would have been able to proceed that much sooner. As for the second claim: (a) the defense never requested a delay based on counsel's pregnancy and child birth; (b) there is no evidence in the record that the district court was aware of counsel's pregnancy, (c) counsel was available to try the case in the event a timely competency decision had been rendered in September 2000, and (d) another attorney from the Office of the Federal Defender would have been available to try the case at any time.

United States Attorney or the court to comply with the Act.'") (quoting *Pringle*, 751 F.2d at 434).

Viewed from this deterrent standpoint, the Act's mandatory dismissal provision makes perfect sense. As this Court recognized in *Taylor*, "Dismissal without prejudice is not a toothless sanction: it forces the Government to obtain a new indictment if it decides to reprosecute, and it exposes the prosecution to dismissal on statute of limitations grounds.[18] Given the burdens borne by the prosecution and the effect of delay on the Government's ability to meet those burdens, substantial delay well may make reprosecution, even if permitted, unlikely." 487 U.S. at 342; *see also United States v. Janik*, 723 F.2d 537, 546 (7th Cir. 1983) (dismissal without prejudice serves a deterrent purpose since "the grand jury may refuse to reindict and since even if it does the defendant may be acquitted").

The Second Circuit noted the potential costs and consequences of a rule of mandatory dismissal and concluded that dismissal, without regard to harm, is "absurd," "perverse," and "illogical." J.A. 207-08. But these costs and consequences – and the certainty that they will follow whenever the Act's time limits are violated – are precisely what give the dismissal sanction its teeth.

The Second Circuit's holding also undermines the central legislative compromise embodied in Section 3162(a)(2). *See Taylor*, 487 U.S. at 333-35. Early versions

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[18] Congress later amended 18 U.S.C. § 3288 to provide a grace period from the statute of limitations to permit reindictment when an indictment is dismissed "for any reason." *See* Pub. L. No. 100-690, § 7081(a), 102 Stat. 4407 (eff. Nov. 18, 1988).

of the Act required dismissal only "with prejudice." H.R. 7107, 92d Cong., 1st Sess. (1971); S. 895, 92d Cong., 1st Sess. (1971). This inflexible sanction generated much controversy in Congress, with proponents arguing that an absolute bar to reprosecution was essential to ensure compliance with the Act's time periods and opponents arguing that this sanction was too harsh. *Taylor*, 487 U.S. at 333-34. Eventually, "a compromise was reached that incorporated, through amendments on the floor of the House of Representatives, the language that eventually became § 3162(a)(2)." *Id.* at 334. The mandatory dismissal sanction was retained, but Congress granted courts flexibility to dismiss without prejudice. The Second Circuit, however, by banishing mandatory dismissal from the statute and allowing no dismissal at all unless prejudice has been shown, violated its duty to "ensure that the purposes of the Act and the legislative compromise it reflects are given effect." *Id.* at 336.

D. The decision of the court of appeals should be vacated.

Given the unambiguous mandate of Section 3162(a)(2), a court may not ignore a violation of the 70-day time limit, as the Second Circuit did here, merely because the court believes that the case was tried to "satisfactory conclusion" and that dismissal would cause "expense" and "inefficiency." J.A. 208. As this Court has declared, "It is well established that when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (internal quotation marks omitted); *accord Richards v. United States*, 369 U.S. 1, 10 (1962) (courts "are bound

to operate within the framework of the words chosen by Congress and not to question the wisdom of the latter in the process of construction.").

The court of appeals did not see why a violation of the Act's 70-day time limit by "a few days," with no "substantial adverse effect," should require dismissal. J.A. 208. The answer is as simple as it is dispositive: Because the Act so decrees. While the court of appeals opined that the public interest is better served by no dismissal in the absence of specific harm, that policy determination has already been made by Congress and cannot be disturbed. *See Bozeman*, 533 U.S. at 156 ("[T]he parties would more appropriately address these policy arguments to legislatures.").

In summary, the court of appeals erred by disregarding the text of the Speedy Trial Act. By injecting a rule of harmless error into the Act, the court violated the statute's language and structure, weakened its effectiveness, and undermined its central purpose of protecting the public. As the Justice Department advised Congress during the 1971 Senate hearings:

> [I]t may well be * * * that the whole system of federal criminal justice needs to be shaken by the scruff of its neck, and brought up short with a relatively peremptory instruction to prosecutors, defense counsel, and judges alike that criminal cases must be tried within a particular period of time. That is certainly the import of the mandatory dismissal provisions of your bill.

Prepared Statement of Assistant Attorney General William H. Rehnquist, 1971 Senate Hearings at 107, *quoted in* Partridge at 17. Accordingly, the decision below should be vacated.

CONCLUSION

For the reasons stated in Point I, the Court should reverse the judgment below and remand for dismissal of the indictment, with or without prejudice. For the reasons stated in Point II, the Court should vacate the judgment below and remand for a determination of whether the Speedy Trial Act's 70-day time limit was exceeded based upon the delay from August 23, 2000 to March 6, 2001.

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February 21, 2006

Respectfully submitted,

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APPENDIX

Speedy Trial Act of 1974,
18 U.S.C. §§ 3161-3174 (West 2005)

CHAPTER 208 – SPEEDY TRIAL

Sec.
3161. Time limits and exclusions.
3162. Sanctions.
3163. Effective dates.
3164. Persons detained or designated as being of high risk.
3165. District plans – generally.
3166. District plans – contents.
3167. Reports to Congress.
3168. Planning process.
3169. Federal Judicial Center.
3170. Speedy trial data.
3171. Planning appropriations.
3172. Definitions.
3173. Sixth amendment rights.
3174. Judicial emergency and implementation.

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with

such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable

with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to –

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant,

pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or

information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly –

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

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§ 3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant

to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

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§ 3163. Effective dates

(a) The time limitation in section 3161(b) of this chapter –

(1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in connection with the commission of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration.

(b) The time limitation in section 3161(c) of this chapter –

(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

(c) Subject to the provisions of section 3174(c), section 3162 of this chapter shall become effective and apply to all cases commenced by arrest or summons, and all informations or indictments filed, on or after July 1, 1980.

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§ 3164. Persons detained or designated as being of high risk

(a) The trial or other disposition of cases involving –

(1) a detained person who is being held in detention solely because he is awaiting trial, and

(2) a released person who is awaiting trial and has been designated by the attorney for the Government as being of high risk,

shall be accorded priority.

(b) The trial of any person described in subsection (a)(1) or (a)(2) of this section shall commence not later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitation specified in this section.

(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required.

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§ 3165. District plans – generally

(a) Each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrate judges of the district and shall prepare plans for the disposition of criminal cases in accordance with this chapter. Each such plan shall be formulated after consultation with, and after considering the recommendations of, the Federal Judicial Center and the planning group established for that district pursuant to section 3168. The plans shall be prepared in

accordance with the schedule set forth in subsection (e) of this section.

(b) The planning and implementation process shall seek to accelerate the disposition of criminal cases in the district consistent with the time standards of this chapter and the objectives of effective law enforcement, fairness to accused persons, efficient judicial administration, and increased knowledge concerning the proper functioning of the criminal law. The process shall seek to avoid underenforcement, overenforcement and discriminatory enforcement of the law, prejudice to the prompt disposition of civil litigation, and undue pressure as well as undue delay in the trial of criminal cases.

(c) The plans prepared by each district court shall be submitted for approval to a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district court whose plan is being reviewed or such other active judge of that court as the chief judge of that district court may designate. If approved by the reviewing panel, the plan shall be forwarded to the Administrative Office of the United States Courts, which office shall report annually on the operation of such plans to the Judicial Conference of the United States.

(d) The district court may modify the plan at any time with the approval of the reviewing panel. It shall modify the plan when directed to do so by the reviewing panel or the Judicial Conference of the United States. Modifications shall be reported to the Administrative Office of the United States Courts.

(e)(1) Prior to the expiration of the twelve-calendar-month period following July 1, 1975, each United States

district court shall prepare and submit a plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the second and third twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c).

(2) Prior to the expiration of the thirty-six calendar month period following July 1, 1975, each United States district court shall prepare and submit a plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the fourth and fifth twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c).

(3) Not later than June 30, 1980, each United States district court with respect to which implementation has not been ordered under section 3174(c) shall prepare and submit a plan in accordance with subsections (a) through (d) to govern the trial or other disposition of offenses within the jurisdiction of such court during the sixth and subsequent twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c) in effect prior to the date of enactment of this paragraph.

(f) Plans adopted pursuant to this section shall, upon adoption, and recommendations of the district planning group shall, upon completion, become public documents.

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§ 3166. District plans – contents

(a) Each plan shall include a description of the time limits, procedural techniques, innovations, systems and other methods, including the development of reliable methods for gathering and monitoring information and statistics, by which the district court, the United States attorney, the Federal public defender, if any, and private attorneys experienced in the defense of criminal cases, have expedited or intend to expedite the trial or other disposition of criminal cases, consistent with the time limits and other objectives of this chapter.

(b) Each plan shall include information concerning the implementation of the time limits and other objectives of this chapter, including:

(1) the incidence of and reasons for, requests or allowances of extensions of time beyond statutory or district standards;

(2) the incidence of, and reasons for, periods of delay under section 3161(h) of this title;

(3) the incidence of, and reasons for, the invocation of sanctions for noncompliance with time standards, or the failure to invoke such sanctions, and the nature of the sanction, if any invoked for noncompliance;

(4) the new timetable set, or requested to be set, for an extension;

(5) the effect on criminal justice administration of the prevailing time limits and sanctions, including the effects on the prosecution, the defense, the courts, the correctional process, costs, transfers and appeals;

(6) the incidence and length of, reasons for, and remedies for detention prior to trial, and information required by the provisions of the Federal Rules of Criminal Procedure relating to the supervision of detention pending trial;

(7) the identity of cases which, because of their special characteristics, deserve separate or different time limits as a matter of statutory classifications;

(8) the incidence of, and reasons for each thirty-day extension under section 3161(b) with respect to an indictment in that district; and

(9) the impact of compliance with the time limits of subsections (b) and (c) of section 3161 upon the civil case calendar in the district.

(c) Each district plan required by section 3165 shall include information and statistics concerning the administration of criminal justice within the district, including, but not limited to:

(1) the time span between arrest and indictment, indictment and trial, and conviction and sentencing;

(2) the number of matters presented to the United States Attorney for prosecution, and the numbers of such matters prosecuted and not prosecuted;

(3) the number of matters transferred to other districts or to States for prosecution;

(4) the number of cases disposed of by trial and by plea;

(5) the rates of nolle prosequi, dismissal, acquittal, conviction, diversion, or other disposition;

(6) the extent of preadjudication detention and release, by numbers of defendants and days in custody or at liberty prior to disposition; and

(7)(A) the number of new civil cases filed in the twelve-calendar-month period preceding the submission of the plan;

(B) the number of civil cases pending at the close of such period; and

(C) the increase or decrease in the number of civil cases pending at the close of such period, compared to the number pending at the close of the previous twelve-calendar-month period, and the length of time each such case has been pending.

(d) Each plan shall further specify the rule changes, statutory amendments, and appropriations needed to effectuate further improvements in the administration of justice in the district which cannot be accomplished without such amendments or funds.

(e) Each plan shall include recommendations to the Administrative Office of the United States Courts for reporting forms, procedures, and time requirements. The Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, shall prescribe such forms and procedures and time requirements consistent with section 3170 after consideration of the recommendations contained in the district plan and the need to reflect both unique local conditions and uniform national reporting standards.

(f) Each plan may be accompanied by guidelines promulgated by the judicial council of the circuit for use by

all district courts within that circuit to implement and secure compliance with this chapter.

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§ 3167. Reports to Congress

(a) The Administrative Office of the United States Courts, with the approval of the Judicial Conference, shall submit periodic reports to Congress detailing the plans submitted pursuant to section 3165. The reports shall be submitted within three months following the final dates for the submission of plans under section 3165(e) of this title.

(b) Such reports shall include recommendations for legislative changes or additional appropriations to achieve the time limits and objectives of this chapter. The report shall also contain pertinent information such as the state of the criminal docket at the time of the adoption of the plan; the extent of pretrial detention and release; and a description of the time limits, procedural techniques, innovations, systems, and other methods by which the trial or other disposition of criminal cases have been expedited or may be expedited in the districts. Such reports shall also include the following:

(1) The reasons why, in those cases not in compliance with the time limits of subsections (b) and (c) of section 3161, the provisions of section 3161(h) have not been adequate to accommodate reasonable periods of delay.

(2) The category of offenses, the number of defendants, and the number of counts involved in those cases which are not meeting the time limits specified in subsections (b) and (c) of section 3161.

(3) The additional judicial resources which would be necessary in order to achieve compliance with the time limits specified in subsections (b) and (c) of section 3161.

(4) The nature of the remedial measures which have been employed to improve conditions and practices in those districts with low compliance experience under this chapter or to promote the adoption of practices and procedures which have been successful in those districts with high compliance experience under this chapter.

(5) If a district has experienced difficulty in complying with this chapter, but an application for relief under section 3174 has not been made, the reason why such application has not been made.

(6) The impact of compliance with the time limits of subsections (b) and (c) of section 3161 upon the civil case calendar in each district as demonstrated by the information assembled and statistics compiled and submitted under sections 3166 and 3170.

(c) Not later than December 31, 1979, the Department of Justice shall prepare and submit to the Congress a report which sets forth the impact of the implementation of this chapter upon the office of the United States Attorney in each district and which shall also include –

(1) the reasons why, in those cases not in compliance, the provisions of section 3161(h) have not been adequate to accommodate reasonable periods of delay;

(2) the nature of the remedial measures which have been employed to improve conditions and practices in the offices of the United States Attorneys in those districts with low compliance experience under

this chapter or to promote the adoption of practices and procedures which have been successful in those districts with high compliance experience under this chapter;

(3) the additional resources for the offices of the United States Attorneys which would be necessary to achieve compliance with the time limits of subsections (b) and (c) of section 3161;

(4) suggested changes in the guidelines or other rules implementing this chapter or statutory amendments which the Department of Justice deems necessary to further improve the administration of justice and meet the objectives of this chapter; and

(5) the impact of compliance with the time limits of subsections (b) and (c) of section 3161 upon the litigation of civil cases by the offices of the United States Attorneys and the rule changes, statutory amendments, and resources necessary to assure that such litigation is not prejudiced by full compliance with this chapter.

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§ 3168. Planning process

(a) Within sixty days after July 1, 1975, each United States district court shall convene a planning group consisting at minimum of the Chief Judge, a United States magistrate judge, if any designated by the Chief Judge, the United States Attorney, the Clerk of the district court, the Federal Public Defender, if any, two private attorneys, one with substantial experience in the defense of criminal cases in the district and one with substantial experience in civil litigation in the district, the Chief United States Probation Officer for the district, and a person skilled in criminal justice research who shall act as reporter for the

group. The group shall advise the district court with respect to the formulation of all district plans and shall submit its recommendations to the district court for each of the district plans required by section 3165. The group shall be responsible for the initial formulation of all district plans and of the reports required by this chapter and in aid thereof, it shall be entitled to the planning funds specified in section 3171.

(b) The planning group shall address itself to the need for reforms in the criminal justice system, including but not limited to changes in the grand jury system, the finality of criminal judgments, habeas corpus and collateral attacks, pretrial diversion, pretrial detention, excessive reach of Federal criminal law, simplification and improvement of pretrial and sentencing procedures, and appellate delay.

(c) Members of the planning group with the exception of the reporter shall receive no additional compensation for their services, but shall be reimbursed for travel, subsistence and other necessary expenses incurred by them in carrying out the duties of the advisory group in accordance with the provisions of title 5, United States Code, chapter 57. The reporter shall be compensated in accordance with section 3109 of title 5, United States Code, and notwithstanding other provisions of law he may be employed for any period of time during which his services are needed.

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§ 3169. Federal Judicial Center

The Federal Judicial Center shall advise and consult with the planning groups and the district courts in connection with their duties under this chapter.

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§ 3170. Speedy trial data

(a) To facilitate the planning process, the implementation of the time limits, and continuous and permanent compliance with the objectives of this chapter, the clerk of each district court shall assemble the information and compile the statistics described in sections 3166(b) and 3166(c) of this title. The clerk of each district court shall assemble such information and compile such statistics on such forms and under such regulations as the Administrative Office of the United States Courts shall prescribe with the approval of the Judicial Conference and after consultation with the Attorney General.

(b) The clerk of each district court is authorized to obtain the information required by sections 3166(b) and 3166(c) from all relevant sources including the United States Attorney, Federal Public Defender, private defense counsel appearing in criminal cases in the district, United States district court judges, and the chief Federal Probation Officer for the district. This subsection shall not be construed to require the release of any confidential or privileged information.

(c) The information and statistics compiled by the clerk pursuant to this section shall be made available to the district court, the planning group, the circuit council, and the Administrative Office of the United States Courts.

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§ 3171. Planning appropriations

(a) There is authorized to be appropriated for the fiscal year ending June 30, 1975, to the Federal judiciary the sum of $2,500,000 to be allocated by the Administrative Office of the United States Courts to Federal judicial districts to carry out the initial phases of planning and implementation of speedy trial plans under this chapter. The funds so appropriated shall remain available until expended.

(b) No funds appropriated under this section may be expended in any district except by two-thirds vote of the planning group. Funds to the extent available may be expended for personnel, facilities, and any other purpose permitted by law.

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§ 3172. Definitions

As used in this chapter –

(1) the terms "judge" or "judicial officer" mean, unless otherwise indicated, any United States magistrate judge, Federal district judge, and

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a Class B or C misdemeanor or an infraction, or an offense triable by court-martial, military commission, provost court, or other military tribunal).

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§ 3173. Sixth amendment rights

No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution.

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§ 3174. Judicial emergency and implementation

(a) In the event that any district court is unable to comply with the time limits set forth in section 3161(c) due to the status of its court calendars, the chief judge, where the existing resources are being efficiently utilized, may, after seeking the recommendations of the planning group, apply to the judicial council of the circuit for a suspension of such time limits as provided in subsection (b). The judicial council of the circuit shall evaluate the capabilities of the district, the availability of visiting judges from within and without the circuit, and make any recommendations it deems appropriate to alleviate calendar congestion resulting from the lack of resources.

(b) If the judicial council of the circuit finds that no remedy for such congestion is reasonably available, such council may, upon application by the chief judge of a district, grant a suspension of the time limits in section 3161(c) in such district for a period of time not to exceed one year for the trial of cases for which indictments or informations are filed during such one-year period. During such period of suspension, the time limits from arrest to indictment, set forth in section 3161(b), shall not be reduced, nor shall the sanctions set forth in section 3162 be suspended; but such time limits from indictment to trial shall not be increased to exceed one hundred and eighty days. The time limits for the trial of cases of detained persons who are being detained solely because

they are awaiting trial shall not be affected by the provisions of this section.

(c)(1) If, prior to July 1, 1980, the chief judge of any district concludes, with the concurrence of the planning group convened in the district, that the district is prepared to implement the provisions of section 3162 in their entirety, he may apply to the judicial council of the circuit in which the district is located to implement such provisions. Such application shall show the degree of compliance in the district with the time limits set forth in subsections (b) and (c) of section 3161 during the twelve-calendar-month period preceding the date of such application and shall contain a proposed order and schedule for such implementation, which includes the date on which the provisions of section 3162 are to become effective in the district, the effect such implementation will have upon such district's practices and procedures, and provision for adequate notice to all interested parties.

(2) After review of any such application, the judicial council of the circuit shall enter an order implementing the provisions of section 3162 in their entirety in the district making application, or shall return such application to the chief judge of such district, together with an explanation setting forth such council's reasons for refusing to enter such order.

(d)(1) The approval of any application made pursuant to subsection (a) or (c) by a judicial council of a circuit shall be reported within ten days to the Director of the Administrative Office of the United States Courts, together with a copy of the application, a written report setting forth in sufficient detail the reasons for granting such application, and, in the case of an application made

pursuant to subsection (a), a proposal for alleviating congestion in the district.

(2) The Director of the Administrative Office of the United States Courts shall not later than ten days after receipt transmit such report to the Congress and to the Judicial Conference of the United States. The judicial council of the circuit shall not grant a suspension to any district within six months following the expiration of a prior suspension without the consent of the Congress by Act of Congress. The limitation on granting a suspension made by this paragraph shall not apply with respect to any judicial district in which the prior suspension is in effect on the date of the enactment of the Speedy Trial Act Amendments Act of 1979.

(e) If the chief judge of the district court concludes that the need for suspension of time limits in such district under this section is of great urgency, he may order the limits suspended for a period not to exceed thirty days. Within ten days of entry of such order, the chief judge shall apply to the judicial council of the circuit for a suspension pursuant to subsection (a).

28 U.S.C. § 2111 (West 2005)

§ 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Federal Rule of Criminal Procedure 52(a) (West 2005)

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.